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Nos. 84-1555 and 84-1567

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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Appellee.

WOODWARD SAND COMPANY, INC.,
Appellant,

v.

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On Appeal from a Three-Judge Court
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Central District of California

BRIEF OF THE TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1950 AND 1974 PENSION PLANS AS AMICI CURIAE IN SUPPORT OF APPELLEE

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BRIEF OF THE TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1950 AND 1974 PENSION PLANS AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF THE AMICI CURIAE

Amici are the Trustees of the United Mine Workers of America ("UMWA") 1950 and 1974 Pension Plans ("1950 Plan" and "1974 Plan," and collectively "Plans"), two multiemployer pension plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1001 *et seq.* (1982). The Plans are maintained under collective bargaining agreements between the UMWA and the

Bituminous Coal Operators' Association, Inc. ("BCOA"), other employer associations, and independent employers, all engaged in coal mining or other coal-related businesses. The Plans are among the largest multiemployer plans in the nation. They pay pension benefits to more than 126,000 retired and disabled coal miners, or their widows. There are more than 88,000 active participants in the 1974 Plan.

The Plans are a continuation of one of the first collectively-bargained multiemployer plans. That plan came into existence in 1946, through negotiations between the UMWA and the federal government, which had seized the nation's coal mines under emergency powers. *See* 26 U.S.C. § 404(c) (1982 & 1983 Supp.); 26 C.F.R. § 1.404(c)-1(b)(1985). For most of its existence, that plan was known as the UMWA Welfare and Retirement Fund of 1950 ("1950 Fund").

In the decades that followed the Second World War, the number of jobs in the coal industry declined precipitously, particularly in the unionized sector. See *Roark v. Boyle* , 439 F.2d 497, 506 (D.C. Cir. 1970). As befitted a plan in an industry with a declining job base and undergoing mechanization, contributions to the 1950 Fund were based on units of production, *i.e.*, tons of coal mined. *Id.* at 505. Although the per-ton contribution rate was set by the National Bituminous Coal Wage Agreement ("Wage Agreement"), *id.*, contributions did not always keep pace with current benefit obligations, much less allow a reserve to be established for future obligations. Consequently, the 1950 Fund was operated on a "pay-as-you-go" basis and, like many plans of that era, did not promise vested benefits. *Id.*; see also *Short v. UMWA 1950 Pension Trust*, 728 F.2d 528, 537-38 (D.C. Cir. 1984).

The Trustees of the 1950 Fund were given full discretion, by the bargaining parties, to set and alter eligibility requirements and benefit levels. See *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 565 and *id.* n.2 (1982). As production slackened and the number of retirees increased,[1] the Trustees

[1]The situation was exacerbated by the fact that tens of thousands were added to the retirement rolls as a result of numerous court decisions or class action settlements that forced the Trustees to liberalize the eligibility requirements. *E.g.*, *Roark v. Boyle*, 439 F.2d 497; *Pete v. UMWA Welfare and Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. 1975) (*en banc*); *Blankenship v. UMWA Welfare and Retirement*

repeatedly were forced to tighten eligibility requirements or reduce benefits to prevent a shortfall . Nevertheless, by 1974, when ERISA was enacted, the 1950 Fund was severely underfunded.

ERISA imposed minimum vesting and funding requirements on pension plans for the first time. 29 U.S.C. §§ 1053, 1081 *et seq.* Because of that fact, the UMWA and the BCOA, confronting billions of dollars in unfunded vested benefits, recognized that the industry's pension program would have to be completely overhauled. Toward that end, the bargaining parties replaced the 1950 Fund with two separate Plans in the 1974 Wage Agreement.

The 1950 Plan was established to cover only those who were already retired or would retire before the effective date of ERISA. The 1950 Plan would therefore not accrue any substantial liabilities for future service. The Plan, however, inherited $1.7 billion in past service liabilities and only $49 million in assets from the 1950 Fund. The 1974 Plan was established to cover those who would retire after the effective date of ERISA. The Plan inherited no assets and $1.6 billion in past service liabilities. See *Calvert & Youngblood Coal Co. v. UMWA 1950 and 1974 Pension Plans* (hereinafter "*Calvert* "), 5 EBC 2361, 2363 (1984) (Polak, Arb.), *enforced*, 6 EBC 1106 (N.D. Ala. 1985).

To strengthen these new Plans, the bargaining parties increased the per-ton contribution rates. They also agreed, for the first time, to a contribution on man-hours.[2] More important, to control the growth of benefit obligations, they incorporated specific eligibility requirements and benefit levels in the 1974 Wage Agreement, rather than continuing to leave such matters to the Trustees' discretion. See *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. at 566-67.

Despite these changes, however, the Plans soon began to suffer renewed financial difficulties. Contributions fell below

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Fund of 1950, Nos. 2186-69 and 2350-69 (D.D.C. February 26, 1973) (order approving settlement).

[2]These contributions were allocated among the two Plans and two sister plans that provided welfare benefits. The 1950 Fund had previously provided both pension and welfare benefits.

expected levels because coal production was curtailed by unauthorized work stoppages and harsh winters. See *Allen v. UMWA 1979 Ben. Plan and Trust*, 4 EBC 1349, 1352 (S.D. Ind. 1983), *aff'd*, 726 F.2d 352 (7th Cir. 1984); *Caudle v. UMWA*, 523 F.Supp. 91, 93 (N.D. Ala. 1981). Consequently, the bargaining parties had to reallocate future contribution income to the two Plans from one of the welfare plans several times during the term of the 1974 Wage Agreement. See *Caudle v. UMWA*, 523 F.Supp. at 93-94.

Nevertheless, the financial difficulties mounted. When the 1974 Wage Agreement expired in December, 1977, the 1950 Plan was unable to pay benefits for several months during a 111-day strike that followed. Later, the Plan had to take out a bank loan to make up the missed payments. See *Palmer Coking Coal Co. v. UMWA 1950 and 1974 Pension Plans* (hereinafter "*Palmer*"), 5 EBC 2369, 2371 (1984) (Gordon Arb.), *complaint to modify, and as modified to enforce*, No. 84-3407 (D.D.C. filed November 7, 1984).

The strike was settled by the execution of the 1978 Wage Agreement. In that Agreement, the bargaining parties made further efforts to shore up the Plans. They once again increased the contribution rates. And, with the strike freshly in mind, the employers agreed to "fully guarantee" benefits during the term of the Agreement and to increase the contribution rates in mid-term if necessary.

Nevertheless, because their assets had been depleted by the earlier strike, when no contributions were made, the Plans continued to be very poorly funded throughout the 1978 Wage Agreement. See *Palmer*, 5 EBC at 2371; *Calvert*, 5 EBC at 2363-64. At the beginning of the 1978 Wage Agreement, the 1950 Plan actually had no assets, and indeed owed the money it had borrowed to continue benefit payments. See *Palmer*, 5 EBC at 2371. And, the 1974 Plan would have failed to comply with the minimum funding standards, except for a special accounting technique, authorized by IRS regulations, that allowed it to "borrow" future contributions. See *id.*; *Calvert*, 5 EBC at 2364-65.

On the eve of MPPAA's enactment in 1980, the 1950 Plan was among the worst funded multiemployer plans in the nation, and the 1974 Plan was very poorly funded in comparison to

most plans. *Calvert*, 5 EBC at 2363, 2364.[3] Indeed, the specter of the 1950 Plan terminating was the single greatest potential threat to the PBGC's insurance program. These facts were not lost upon the PBGC or the Congress. See 126 Cong. Rec. S10104-06 (daily ed. July 29, 1980) (remarks of Sen. Randolph). Consequently, Congress was attentive to the concerns of the UMWA and the BCOA over the precarious position of the coal industry Plans. Both of these parties endorsed an amendment to prevent withdrawing employers from dumping all of a plan's liabilities on the employers that remain.

In this respect, BCOA president Joseph Brennan testified that withdrawal liability was a means to assure that employers "cannot withdraw from a continuing plan and shift their liabilities to the remaining employers. Such an amendment is necessary for the future viability of pension plans, as the law currently provides an incentive for employers to withdraw from a multiemployer plan, thereby reducing the funding base." *Proposed Amendments to ERISA Regarding Multiemployer Pension Plans: Hearings Before the Pension Task Force, Subcomm. on Labor-Management Relations, Comm. on Education and Labor, United States House of Representatives* (hereinafter "*Hearings*"), 96th Cong., 1st Sess. 825 (1979).

This theme was repeated by UMWA economist Donald Pierce, who noted that each of the Plans had close to $2 billion in unfunded vested benefits (" UVB ").[4] In recognition of that fact, Pierce went on to conclude that "[i]t is imperative that existing participating employers in multiemployer plans be kept in the fold," so that "an ever increasing liability is not added to those employers who remain with the plan while others abandon the plan." *Hearings* at 863.

After consideration of the concerns expressed by the UMWA and the BCOA, Senator Randolph forcefully reviewed

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[3] When MPPAA's "reorganization" provisions became effective for underfunded plans in serious jeopardy, the 1950 Plan was immediately cast into reorganization status. Under reorganization, a plan must be funded at a faster rate, contributions may be increased, and benefit increases may be cancelled. 29 U.S.C. §§ 1423, 1425.

[4] UVB is the actuarial present value of vested benefits minus the value of plan assets. 29 U.S.C. § 1393(c).

the historic plight of the Plans and characterized withdrawal liability as a form of "relief to responsible employers who attempt to weather any severe economic difficulties the plan may face." "By encouraging all employers to continue their obligations and bear their fair share of the plan's responsibilities," he continued, "the likelihood is lessened that the severe economic pressures [on remaining employers, on plans and on the PBGC] envisioned in the bill will ever be reached." 126 Cong. Rec. at S10105.

Based on the foregoing, it is clear that not all employers in the coal industry are opposed to withdrawal liability. Far from it. To those employers who are financially responsible and have remained with the Plans, withdrawal liability assures that those who have withdrawn, and who have availed themselves of the benefits of these multiemployer plans, will bear their fair share of the funding burden.[5] Absent that protection, the burden will fall to fewer and fewer, until those remaining find it intolerable. Obviously, this fact was not lost upon the BCOA, which testified in support of withdrawal liability.

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[5]Among the benefits to employers, multiemployer plans provide for a pooling of employer contributions, so that employers share the cost of providing pensions to their employees. *Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 582 F.Supp. 301, 303-04 (D.D.C. 1983) (hereinafter "*Washington Star*"), *aff'd*, 729 F.2d 1502 (D.C. Cir. 1984). Multiemployer plans also have lower administrative costs and greater pools of assets, and, hence, more investment options than single employer plans. And, they frequently allow for past service credit for periods before an employer was a contributor, *Washington Star*, 582 F.Supp. at 303; see 29 U.S.C. § 1053(b)(1)(C), and must allow for portability of service credit, 29 U.S.C. § 1053(b)(1), 29 C.F.R. § 2530.210(c)(1) (1985), which is particularly important in an industry where employees are often required by economic conditions to change employers. Because of these features, a multiemployer plan is a plan "the employer might himself have established in his own economic interest." They assure a "trained and reasonably contented labor supply," which is "an asset to the employer." *Roark v. Boyle* , 439 F.2d at 506. *Accord Washington Star*, 582 F.Supp. at 303-04; *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, ____U.S. ____, 105 S.Ct. 2116 (1985).

A more obvious benefit to the employer is that contributions to such a plan are tax deductible. 26 U.S.C. §§ 401(a), 404(a)(1), 501(a).

Moreover, terminations of large, poorly funded multiemployer plans could overwhelm the PBGC's insurance program, and ERISA's promise of vested benefits would then be hollow indeed. And, despite the generalizations cited by *amicus* National Association of Manufacturers ("NAM") at pages 7-11 of its Brief, many large plans are very poorly funded and employer withdrawals can significantly damage their contribution base.[6]

In the six years preceding MPPAA, the 1950 Plan was on the average only 3% funded and the 1974 Plan was only 19% funded. See *Palmer*, 5 EBC at 2371. And, since the enactment of MPPAA, the Plans' employer base has declined from almost 2,300 to less than 1,600, as a result of employer withdrawals. Those employers' share of the Plans' underfunding, assessed as withdrawal liability claims, totals over $130 million, which would otherwise have been borne by the remaining employers.

This liability should not be viewed as a penalty; it is simply a cost of doing business. While the business decisions regarding pension plan participation may be hard, they certainly exist to be made. Indeed, a substantial number of employers in the coal industry have joined with the UMWA to act in a responsible

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[6] The GAO Study cited by NAM itself states that "the smaller plans were generally better funded than the larger plans in the sample," that 24 of the 91 plans in the sample were less than 50% funded and had low ratios of assets to benefit payments, that such plans have a "high potential for insolvency" and without withdrawal liability could pose a threat to the PBGC insurance program, and that withdrawal liability provides "increased financial protection for the plans" and "a measure of protection against insolvency of the [insurance] program." GAO, *Report to the Congress, Effects of Liabilities Assessed Employers withdrawing from Multiemployer Pension Plans* 8, 11 (1985).

Indeed, a contemporaneous GAO report on a related subject concludes that 14 large financially distressed plans alone had UVB that were 149 times the assets of the PBGC insurance program and that those plans "could not withstand further financial deterioration without posing a substantial risk to the insurance program." GAO, *Report to the Congress, The 1980 Multiemployer Pension Plan Amendments Act: An Assessment of Funding Requirement Changes* 18 (1985).

partnership to control underfunding, by agreeing not only to contribution levels but to eligibility requirements and the level of benefits. Some employers, however, have decided to withdraw from the Plans. A substantial number of these withdrawals have occurred at the end of a collective bargaining agreement. This can only mean that these employers have made a business decision to operate non-union or to go into a different line of business. *E.g., Combs v. Adkins & Adkins Coal Co.*, 597 F.Supp. 122, 126 (D.D.C. 1984) (employer reconstituted as a "non-union shop"). Every business decision has costs as well as benefits, however, and withdrawal liability is the cost of promising employees vested pensions that have not been fully funded.

Furthermore, ERISA itself provides many ways to structure a business transaction so that it does not result in the imposition of withdrawal liability or the depletion of a plan's contribution base. *See* 29 U.S.C. § 1384 (sale of assets to contributing employer does not result in imposition of withdrawal liability where, *inter alia*, purchaser posts a bond);[7] § 1398(1), *incorporating by reference* § 1362(d) (mergers, spinoffs and other corporate reorganizations do not constitute withdrawals where successor corporation is a contributing employer); *Joint Explanation of S. 1076: Multiemployer Pension Plan Amendments Act of 1980*, 126 Cong. Rec. S10115 (daily ed. July 29, 1980) (sale of stock does not result in withdrawal); PBGC Opinion Letter 82-17 (May 26, 1982) (same). *Cf.* 29 U.S.C. § 1415 (employer entitled to reduction of withdrawal liability where assets and liabilities are transferred to another multiemployer plan following a change of collective bargaining representative).

Moreover, an employer contemplating withdrawal has the right to have the plan calculate his potential withdrawal liabil-

[7] The PBGC has been given authority to vary the bonding requirement 29 U.S.C. § 1384(c), and PBGC has granted a waiver of that requirement on a class-wide basis where the transaction is *de minimis* or the purchaser is financially responsible. 29 C.F.R. § 2643.10 *et seq.* (1985). PBGC has also granted many individual waivers. *E.g., U.S. Steel Mining Co., Inc.*, 49 Fed. Reg. 9037 (March 9, 1984)(noting that the sale of assets rules in 29 U.S.C. § 1384 should be administered "in a manner that assures protection of the plan with the least practicable intrusion into normal business transactions").

ity so that he can make an informed decision. 29 U.S.C. § 1401(e). And, if an employer that has withdrawn decides to reenter the plan, he may have his withdrawal liability abated. *Id.* § 1387; *see* PBGC Prop. Reg. § 2647.1 *et seq.*, 49 Fed. Reg. 8036 (March 5, 1984).

In short, like minimum wage laws, worker's compensation laws and other statutory impositions in the labor field that require payment for value received or damage done, withdrawal liability is a cost of doing business, and a cost that, through proper planning, can be minimized or avoided altogether. And, where an employer is subject to withdrawal liability, its liability is payable in quarterly or monthly installments that approximate its prior contribution history, 29 U.S.C. § 1399(c)(1)(C)(i), (c)(3), assuring no greater business costs upon the withdrawn employer than before the withdrawal.[8]

Based on these considerations, these *amici* believe it is clear that withdrawal liability is a reasonable legislative response to a perceived problem of great importance, and one that provides for rational cost-spreading among the parties involved. As such, it comports with the Due Process Clause and does not implicate the Takings Clause.

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[8] Withdrawal liability, which is "based on the withdrawn employer's contribution history to the plan," provides for "continued funding by the withdrawn employer in line with its previous contributions so as to make the liability an annual business cost." H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 82-83 (1980); see also *Senate Comm. on Labor and Human Resources, The Multiemployer Pension Plan Amendments Act of 1980: Summary of Analysis and Consideration*, 96th Cong., 2d Sess. 20-21 (Comm. Print 1980).

SUMMARY OF ARGUMENT

Last Term, this Court upheld the retroactive imposition of withdrawal liability as a rational measure "adjusting the burdens and benefits of economic life." *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, ____ U.S. ____, 104 S.Ct. 2709, 2717 (1984). Such legislation is appropriately analyzed under the Due Process Clause and not under the Takings Clause.

The imposition of withdrawal liability does require an employer to part with money. But that fact is hardly dispositive of whether MPPAA implicates the Takings Clause. This Court has upheld, on due process grounds, numerous regulatory statutes that require money to be paid for public purposes, such as statutes establishing mandatory insurance programs. Thus, regulatory statutes generally do not implicate the Takings Clause.

Even assuming otherwise, an employer does not have a reasonable "investment-backed expectation" that an agreement that purports to limit his obligation to fund promised pension benefits will not be modified by Congress. Collective bargaining agreements are subject to numerous federal statutes, and it is well settled that the legislature may modify an agreement to achieve a legitimate end. ERISA, a "comprehensive and reticulated" statute, left no doubt that promised pension benefits must be funded, despite contrary provisions in collective bargaining agreements. Nor is withdrawal liability akin to a "physical invasion" or to an interference with contract rights pertaining to specific property.

Like many other federal statutes, MPPAA merely requires employers to pay money for value received or damage done. To say that an employer who has incurred withdrawal liability must be compensated therefor would be effectively to compel the government to "regulate by purchase," and government could not continue if that were so.

ARGUMENT

MPPAA's imposition of withdrawal liability is a regulation of the burdens and benefits of economic life and, as such, does not implicate the Takings Clause.

MPPAA has been the subject of extensive constitutional litigation in the lower courts almost since its enactment.[9] Last Term, however, this Court unanimously held that the retroactive imposition of withdrawal liability did not violate the Due Process Clause.[10] *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, ____ U.S. ____, 104 S.Ct. 2709 (1984). There, the Court upheld the imposition of withdrawal liability for withdrawals that occurred during the 5-month period before MPPAA was enacted, as a rational measure "adjusting the burdens and benefits of economic life." *Id.* at 2717, *quoting from Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Although the Court merely assumed that MPPAA was valid prospectively, *id.* n.7, it used the same test in analyzing its retroactive application: whether it was "justified by a rational legislative purpose." *Id.* at 2718.

These *amici* submit that, as legislation adjusting the burdens and benefits of economic life, MPPAA is appropriately analyzed under the Due Process Clause and not under the Takings Clause. To be sure, withdrawal liability requires an employer to part with money. But it would be a misreading of

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[9] The Courts of Appeals and District Courts have uniformly rejected challenges to MPPAA based on the Takings Clause. *E.g.*, *Terson Co. v. Bakery Drivers & Salesmen Local 194*, 739 F.2d 118 (3d Cir. 1984); *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3553 (1984); *Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3554 (1984); *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396; *Dorn's Transp., Inc. v. I.A.M. Nat. Pension Fund*, 578 F.Supp. 1222 (D.D.C. 1984), *aff'd mem.*, 753 F.2d 166 (D.C. Cir. 1985); *Speckman v. Paddock Chrysler Plymouth, Inc.*, 565 F.Supp. 469 (E.D. Mo. 1983). If not for the fact that this case was heard by a three-judge court, it is unlikely that the issue would have merited this Court's attention. *See* U.S. Sup.Ct. Rule 17.1(a), 28 U.S.C.A. (1984).

[10] U.S. Const. Amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), to conclude that a statute that requires a person to pay money is a "taking" of his "property," within the meaning of the Takings Clause.[11]

In *Webb's*, a state statute allowed a court clerk to withhold the interest earned on an interpleaded fund when he returned the proceeds to its owners. This Court found that, although under a separate statute the clerk could charge a fee for services rendered in connection with the fund, there was no separate police power justification or reasonable basis for the appropriation of interest. 449 U.S. at 163-64. Therefore, "under the narrow circumstances" of that case, there was an unconstitutional taking of property. *Id.* at 164-65.

But the fact that a statute requires a person to pay money is hardly dispositive of whether it implicates the Takings Clause. Justice Holmes was surely stating the obvious when he said that "[g]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), *quoted with approval in Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (hereinafter "*Penn Central*"). If it were otherwise, government could not even raise revenue through taxation. *Penn Central*, 438 U.S. at 124. Accordingly, this Court has upheld, on due process grounds, statutes that require money to be paid for various public purposes, *e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (minimum wage); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (mandatory workers' compensation insurance); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911) (mandatory deposit insurance), to say nothing of the cases where it has upheld alleged "takings" on police power grounds in a more traditional eminent domain context. *E.g.*, *Penn Central*, 438 U.S. 104 (historic district zoning); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (nuisance abatement).

Indeed, this Court has long recognized that regulatory statutes are amenable to review only on due process grounds, provided, in Justice Holmes's words, they do not "go too far."

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[11] U.S. Const. Amend. V (". . . nor shall private property be taken for public use, without just compensation").

(*Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415.) *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, ____U.S. ____, 105 S.Ct. 3108 (1985); *United States v. Locke*, ____U.S. ____, 105 S.Ct. 1785 (1985); *Andrus v. Allard* , 444 U.S. 51 (1979); *Penn Central*, 438 U.S. 124; *Goldblatt v. Town of Hempstead*, 369 U.S. 590; *Noble State Bank v. Haskell*, 219 U.S. 104.

Whether a statute crosses the line between regulation and a taking of property involves "essentially ad hoc , factual inquiries." *Penn Central*, 438 U.S. at 124. But a taking of property is more likely to be found where the statute interferes with "distinct investment-backed expectations" and where the government has effected a "physical invasion," as distinct from a "public program adjusting the benefits and burdens of economic life to promote the common good." *Id.*

An employer does not have a reasonable "investment-backed expectation" in the sanctity of a collective bargaining agreement that purports to limit his obligation to fund the pensions that he has promised to his employees. It is a well accepted principle that contracts are subject to supervening law.[12] For example, collective bargaining agreements are subject to federal minimum wage laws, workplace health and safety laws, equal employment opportunity laws, and laws protecting returning veterans. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. at 575-76. And, agreements may be modified by the legislature where necessary to achieve a legitimate end. *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934); *Block v. Hirsch*, 256 U.S. 135 (1921); *Calhoun v. Massie*, 253 U.S. 170 (1920).

In a like manner, ERISA left no doubt that promised pension benefits must be funded and that an employer had potential liability for an underfunded plan, despite a contrary provision in its collective bargaining agreement. *E.g.*, *Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d at 1272;

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[12]The federal government is not limited by the Contract Clause, U.S. Const. Art.I, § 10, cl. 1. *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 104 S.Ct. at 2719-20 n.9. For Takings Clause purposes, governmental action to void a contract is not compensable. *Compare Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), *with Brooks Scanlon Corp. v. United States*, 265 U.S. 106 (1924).

Dorn's Transp. Co. v. I.A.M. Nat. Pension Fund, 578 F.Supp. at 1235-36; *see Nachman Corp. v. Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *aff'd on statutory grounds*, 446 U.S. 359 (1980). In light of this "comprehensive and reticulated" legislative scheme, *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. at 361, employers can hardly complain that the withdrawal liability amendments upset reasonable "investment-backed expectations." *Cf. Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862, 2875-77 (1984) (where holder of trade secret submitted it to government at time when statute allowed government to disclose it to others, such disclosure did not constitute a taking because holder was on notice of government's authority).

Nor is withdrawal liability akin to a "physical invasion," *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), or even to an interference with contract rights pertaining to specific property. *See, e.g., Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's lien); *see also United States v. Security Industrial Bank*, 459 U.S. 70 (1982) (lien on household goods; decided on statutory grounds). At bottom, the contracts involved here provided nothing but a hope of being able to "escape one's liability in derogation of statutory policies." *Dorn's Transp. Inc. v. I.A.M. Nat. Pension Fund*, 578 F. Supp. at 1235-36; *accord Peick v. Pension Benefit Guaranty Corporation*, 724 F.2d at 1276. In the context of the already pervasive regulation of the field, that was not a cognizable interest under the Takings Clause.

Statutes frequently require payment of money as a *quid pro quo* for value received or damage done. For example, the Federal Coal Mine Health and Safety Act of 1969, as amended, requires coal operators to provide black lung benefits to their former employees, even those whose employment ended before the enactment of the statute. In holding that the Act passed constitutional muster, this Court reasoned that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labors—the operators and the coal consumers." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 18. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155

(government charges fees for services); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) (unemployment compensation funded by tax on employer); *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917) (employer relieved of common law liability for worker's injury in exchange for providing specified compensation for injury without regard to fault).

As this Court said in *Noble State Bank v. Haskell*, 219 U.S. 104, where it upheld mandatory deposit insurance, the "share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume." *Id.* at 111. *Accord American Savings & Loan Assoc. v. County of Marin*, 653 F.2d 364, 372 (9th Cir. 1981), *citing Agins v. Tiburon*, 447 U.S. 255, 262 (1980). Here, employers gained the benefit of an experienced and contented workforce by promising vested pensions, and were able to pool the costs and risks of doing so by participating in a multiemployer plan. See n.5, *infra*. To say that more compensation was due them in return for their obligation to fund the plan would be "effectively [to] compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. at 65 (emphasis in original).

CONCLUSION

Upon the foregoing, the decision of the District Court was correct and in accordance with law, and should be affirmed.

Respectfully submitted,

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